(3)

Single Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR.

CRIMINAL APPEAL NO 958 OF 1997.

CRIMINAL APPEAL UNDER SECTION 374 OF THE CODE OF CRIMINAL PROCEDURE.

Phoolchand, son of Shri Laganram, aged about 25 years, resident of Jhinki Police Stataion Bagicha, District Raigarh, M.P.

... APPELLANT. ACCUSED (In Jail).

V E R S U S.

The State of Madhya Pradesh, through the Station House Officer, Police Station Bagicha, District raigarh, M.P.

... RESPONDENT.

C329
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Filed on .....
by Shri A D Rao
..... Advocate
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Rla. A. R.

(27)

HIGH COURT OF CHHATTISGAHR : AT BILASPUR

Criminal Appeal No.958 of 1997.

Phoolchand, S/o Shri Laganram ... Appellant

Vs.

The State of Madhya Pradesh
(Chhattisgarh) ... Respondent.

* * * * * * *

Judgment

Post for 4 /05/2001.

Sd/-
R.S. Garg
Judge

HIGH COURT OF CHHATTISGARH : AT BILASPUR.

Criminal Appeal No.958 of 1997.

Phoolchand, S/o Shri Laganram ... Appellant.

Vs.

The State of Madhya Pradesh
(Chhattisgarh). ... Respondent.

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Judgment

By Hon.Shri R.S.Garg,J.:

The appellant being aggrieved by the judgment dated 7.2.97. passed in Sessions trial No.217/1996, by the learned Additional Sessions Judge, Jaspur Nagar, convicting the appellant under Sections 450 and 376 I.P.C. and sentencing him to undergo R.I. for 7 years under each count and to pay fine of Rs.1,000/- under each count; in default of payment of fine to undergo S.I. for 3 months for each default, has filed this appeal.

2). The prosecution case in brief is that on 12.5.96 at about 2.00 a.m. when Kaleshwari-prosecutrix was sleeping in her house with Nehru, Hariram and one Sampatbai, the accused who was drunk opened the door, entered in the house and slept with the prosecutrix. As the prosecutrix woke-up, he went and slept with Sampatbai, but after about half an hour he again came to the

prosecutrix and committed rape upon her. When the prosecutrix raised alarms her brother Nehru woke-up and bolted the door from out-side. The brother brought the villagers to the spot; the father of the accused took-away the accused with him. The prosecutrix narrated the entire incident to the villagers. The matter was reported to the police after about 13 hours. The girl was sent for her medical examination. She was examined by the doctor Smt. Bhakala (P.W.3) who submitted her report at Ex.P/5. The clothes of the prosecutrix were seized , slides of the vaginal swab were also prepared and the same were sent to the F.S.L. Certain Panchanamas were prepared and the statements of the witnesses were recorded. The F.S.L. vide their report dated 26.6.96, reported that under-wear of the accused and slides were not stained with blood, while petti-coat and Saree of the prosecutrix were stained with blood and sperms were also found on the said article. On completion of the investigation, the police filed the challan. As the accused abjured the guilt, he was put to trial. After recording the evidence and hearing the parties, the learned trial Court convicted and sentenced the accused as referred to above.

3). Learned counsel for the appellant submits that the facts would clearly show that the present was a case of consent; but as the brother of the prosecutrix woke-up, a false report was lodged. It is also submitted that from the report of

the doctor, it does not appear that sexual assault was made on the prosecutrix. It is further submitted that the appellant is entitled to acquittal.

4). Learned counsel for the State has contended that from the Ex.P/5, the medical report, and, the statements of the witnesses, so also from the Serological report, it would clearly appear that a sexual assault was made on the prosecutrix. He submits that the appellant was rightly convicted by the learned Court below.

5). Ex.P/7- the First Information Report was lodged by P.W.5 Kaleshwari. In the said report, she had clearly stated that the accused committed rape upon her. In the F.I.R. it is clearly mentioned that the accused was caught on the spot and her clothes were stained with blood.

6). Kaleshwari was examined as P.W.5. In her examination in chief, she clearly stated that the accused made a sexual assault on her and committed rape upon her . She had also stated that on her alarms, her brother bolted the door from the outside and thereafter she lodged the report. It was suggested to her in the cross-examination that the report was lodged after about 4/5 days. She denied the suggestion that the accused was sleeping outside their house, but her brother and she herself invited the accused to sleep inside. In the cross-examination, she admitted the fact that after hearing her alarms,

her brother out of fear left the room and bolted the room from out-side. She denied the suggestion of the defence that under the threats of some villagers, she lodged the false report.

7). P.W.2 Filuse Kujur has proved the age of the prosecutrix. According to him, the date of birth of the prosecutrix was 15.8.82. In the cross-examination, he,however, admitted that the parents might have given the date of birth on certain impression. P.W.6 Sampatibai,who was also an in-mate of the house, was declared hostile by the prosecution. P.W.7 Nehru is the brother of the prosecutrix. According to him, after hearing shrieks of her sister, he woke-up and bolted the door from out-side, thereafter he invited the villagers and informed them about the incident. At about 6.00 a.m. the father of the accused came to his house and took-away the accused with him. In his cross-examination, the defence could not bring out any substance which chould support the accused. P.W.8 Shivnath is the person who came to the spot immediately after hearing the alarms raised by Nehru(P.W.7). According to him, the accused was bolted inside the house and in the morning, the father of the accused took the accused with him. P.W.11 J.P.Singh had registered the F.I.R. and referred the prosecutrix for her medical examination.

8). P.W. 12 Dr. M.D.Joshi had performed the

ossification test. He stated before the Court that the age of the prosecutrix could be between 14/15 years. He,however, stated before the Court that there could be a margin of error of about 3 years on eitherside. P.W.3 Dr. Smt. Bhakala had examined the prosecutrix on 14.5.96. She found that the private parts of the prosecutrix were swollen; the vagina was admitting two fingers with difficulty; the hymen was ruptured and on touch were bleeding. She also reported that there were scratch marks on both sides of lebia majora. She also found a bruise of red/brown colour . Her further report was that there was swelling on the perineum . According to her, petti-coat and Saree of P.W.5 Kaleshwari were stained with blood. She was certain that inter-course was committed with the girl.

9). From the above evidence, it does not appear that no rape was committed upon the prosecutrix. The witnesses have clearly stated that the accused entered in the house and made a sexual assault upon the prosecutrix. Nehru (P.W.7) is a young boy of about 15 years; it was not expected of him that at the time of the incident he was to take some steps to save his sister from the clutches of the accused. The accused is shown to be a grown-up man of about 25 years. He was drunk and had already made an assault on the privacy of the prosecutrix. In a situation like this, how a young boy would react would

depend upon the understanding of such a boy. If P.W.7 Nehru came out of the house and bolted the door, then it cannot be held that present was a case of consent. In fact the villagers were invited on the spot, the accused was bolted inside and immediately thereafter the report was lodged.

10). I am unable to hold that the prosedutrix was a consenting party. Even assuming that the prosecutrix was about 16 years or above 16 years of age, then too the defence would not be benefitted, because the present is not a case of consent. The learned Courts below have given cogent reasons for holding that the accused had committed the crime. Even, if the jail sentence awarded under Section 450 I.P.C. is reduced to some lower term, the same again would not help the accused because under Section 376 I.P.C. the minimum awardable sentence would be 7 years.

11). I find no reason to interfere in the matter either on the merits or on the question of sentence. The appeal is dismissed.

Sd/-
R.S. Garg
Judge

/Subbu/.